Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	§	
	§	
Petition of UTEX Communications	§	
Corporation, Pursuant to Section	§	
252(e)(5) of the Communications	§	**WC Docket No. 09-134**
Act, for Preemption of the Jurisdiction	§	
of the Public Utility Commission of	§	
Texas Regarding Interconnection	§	
Disputes with AT&T Texas	§	

REPLY OF UTEX COMMUNICATIONS CORPORATION TO RESPONSES TO PETITION FOR PREEMPTION UNDER 47 U.S.C. § 252(e)

Pursuant to Section 252(e) of the Telecommunications Act 47 U.S.C. § 252(e)(5) (the "Act"), and Rule 51.803 of the Federal Communication Commission's rules, 47 C.F.R. § 51.803, UTEX Communications Corp. ("UTEX") submits this its Reply to the Responses of the Texas Public Utility Commission (the "Texas PUC") and Southwestern Bell Telephone Company d/b/a AT&T Texas f/k/a SBC Texas ("AT&T"), as well as USTA and NECA, in support of its petition that the Commission preempt the jurisdiction of the Texas PUC and arbitrate the pending interconnection.[1]

ARGUMENT

Those who oppose UTEX's petition assert that the Texas PUC has not "failed to act" based on various theories. Their argument cannot succeed as a matter of law. As this Commission has already recognized, the Act creates a binary trigger for preemption: the state commission can only "act" or "fail to act." There is no alternative middle ground that allows it to issue a standstill order that results in a failure to render a decision on an open issue. The United States Court of Appeals for the District of Columbia Circuit specifically ruled that

[1] UTEX will refer to the Incumbent Local Exchange Carrier ("ILEC") involved in this matter using its current d/b/a: "AT&T Texas," although for most of the proceeding below it went by the names "SWBT" or "SBC Texas."

sections 252(e)(5) and 252(e)(6) of the Act are mutually exclusive.[2] The Commission reached the same conclusion:

> A party unsatisfied with a state commission's actions – or lack thereof – regarding a new or existing interconnection agreement has two paths to seek recourse. If the state commission "makes a determination" on an issue, the "aggrieved" party may seek review of that determination in federal district court. In contrast, if the state commission "fails to act to carry out its responsibility under [section 252]" any party may petition the Commission to preempt the state commission's jurisdiction. In doing so, the party seeking preemption bears the burden of "prov[ing] that the state has failed to act to carry out its responsibilities under section 252 of the Act." Because a state commission cannot both act and "fail to act," section 252(e)'s remedies are mutually exclusive, and the Commission will not review the validity of a state commission's determination of an issue presented to that state commission.[3]

Sections 252(e)(5) and (e)(6) are mutually exclusive, but they also constitute the entire universe of results: a state commission either acts by the deadline or it fails to act. The deadline set out in section 252(b)(4)(C) allows no other possibility. That is why the Commission contemplated petitions for preemption even when a state commission does begin to exercise jurisdiction but does not complete processing within nine months of the original request.[4]

An order dismissing on procedural or jurisdictional grounds can constitute the required state "determination" and such an order will not give rise to preemption under section 252(e)(5).[5]

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[2] *Global NAPS, Inc. v. FCC*, 291 F.3d 832, 836-37 (D.C. Cir. 2002) ("Both the plain language and structure of this provision suggest that the remedies it authorizes are distinct and mutually exclusive. If a state commission fails to act, preemption is a viable option; however, if the state agency takes final action disposing of the pending claim, that action can be undone only by a direct review in the appropriate forum.").

[3] Memorandum Opinion and Order, *In the Matter of Petition of Autotel Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Public Utilities Commission of Nevada Regarding Enforcement of Interconnection Agreement with Embarq (formerly Central Telephone of Nevada d/b/a Sprint of Nevada)*, DA 07-5114, WC Docket No. 07-240, 23 FCC Rcd 1, 2 (rel. Jan. 2008) (footnote omitted, emphasis supplied).

[4] *See* 47 C.F.R. § 51.801(b) ("For purposes of this part, a state commission fails to act if the state commission ... fails to complete an arbitration within the time limits established in section 252(b)(4)(C) of the Act.").

[5] "A state commission carrie[s] out 'its responsibility [under section 252]' when it resolves the merits of a section 252 proceeding or dismisses such a proceeding on jurisdictional or procedural grounds." *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, Memorandum Opinion and Order, 15 FCC Rcd 11277, 11280-81, para. 8 (2000) (*Starpower Order*); see also *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc. 's Petition for Arbitration with Ameritech Illinois Before the*

In that event, the dissatisfied party can either seek review from the courts under section 252(e)(6) or attempt to repair the jurisdictional or procedural defect and reapply to the state commission. But while a dismissal order is a final action by the state agency, the law of the case now before the Commission is that the TPUC's abatement order is not final. The federal district court squarely held that this was so.[6] That necessarily means that UTEX's relief can only come from the Commission and that the Commission must take the case.

The Texas PUC's arbitrators knew the effect of what they were doing on UTEX's remedies. The arbitrator's original order provided for dismissal of the case, recognizing that to not exercise jurisdiction over the matter allowed the parties could seek relief under section 202(e)(5).[7] That state commissions may decline to exercise jurisdiction is well established.[8] For example, the State of Virginia does this as a matter of course.. Other states take similar action on a case-by-case basis. The State of New York chose to decline to exercise jurisdiction with regard to intercarrier compensation disputes over ISP-bound traffic.[9]

Illinois Commerce Commission; Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc. 's Petition for Arbitration with BellSouth Before the Georgia Public Service Commission; Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with GTE South Before the Public Service Commission of South Carolina, CC Docket Nos. 97-163, 97-164, 97-165, Memorandum Opinion and Order, 13 FCC Rcd 1755, 1773-74, para. 33 (1997) (*Low Tech Designs Order*) ("[A] state commission does not 'fail to act' when it dismisses or denies an arbitration petition on the ground that it is procedurally defective...."), recon. denied, 14 FCC Rcd 7024 (1999); *Global NAPs South, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia, Inc.*, CC Docket No. 99-198, Memorandum Opinion and Order, 15 FCC Rcd 23318, 23326, 23327, paras. 16, 19 (CCB 1999).

[6] *See* Petition Exhibit 7, District Court Order slip op. at 10-11 ["Defendants note, however, that this Court's jurisdiction is limited to reviewing approved or rejected new ICAs and, because the new ICA at issue in Docket No. 26381 has not been approved or rejected by the PUC, the abatement order serves only as an interlocutory order in the FTA proceedings that cannot be appealed to this Court. The Court agrees."]

[7] *See*, Petition Exhibit 2, TPUC Arbitrators' Order No. 22, Order Dismissing Proceeding ["The Arbitrators note that the parties may seek relief under 47 U.S.C. § 252(e)(5)."]

[8] *See, e,g., AT&T Communications v. Bel/South Telecommunications. Inc.*, 238 F.3d 636, 646 (5th Cir. 2001) (state regulatory agencies may accept or decline role in arbitrating FTA agreements).

[9] Memorandum Opinion and Order, *In the Matter of Petition of Northland Networks, Ltd. for Preemption of the Jurisdiction of the New York Public Service Commission Pursuant to Section 252(e)(5) of the Communications Act of 1934, as Amended*, WC Docket No. 03-242, DA 04-354, ¶¶ 9-10, 19 FCC Rcd 2396, 2400 (rel. Feb. 2004) (emphasis added). That decision refers to other then-recent cases from New York where the state commission made clear it was declining to handle intercarrier compensation disputes.

The Texas PUC Commissioners, however, upon motion for reconsideration, determined to both fail to act and to preclude a request for relief under section 252(e)(5) and (e)(6) through the artifice of ordering an "abatement." When UTEX sought relief from the federal district court under section 252(e)(6), however, the Texas PUC successfully argued that the court lacked jurisdiction because the abatement order was not a final order. At the same time, the Texas PUC categorically represented to the court that UTEX's sole remedy was to obtain preemption under section 252(e)(5).[10] AT&T made the same claim.[11] Both the Texas PUC and AT&T Texas now assert that UTEX cannot – or should not be allowed to – avail itself of the remedy they specifically told the district court was UTEX's only potential remedy. These two parties are legally barred from making these different and inconsistent claims in the two *fora*.[12]

Judicial estoppel is a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position in a subsequent action. *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 33 (1st Cir.

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[10] *See* Petition Exhibit 5 (Texas PUC Motion to Dismiss), at 11 ["Only in a case where state commission makes a final decision does a party have a right to federal court review"], at 12 ["The FTA authorizes state commissions to arbitrate interconnection agreements if they choose to. Where a state commission chooses not to act, or allegedly otherwise fails to carry out its responsibility, FTA Section 252(e)(5) plainly states that an aggrieved party's remedy is to go to the FCC, not to Federal district court ... The provision that UTex cites for this court's jurisdiction, 47 U.S.C. § 252(e)(6), plainly states that a proceeding before the FCC, rather than a Federal court lawsuit, is the exclusive remedy for a state commission's failure to act ... Simply put, if the PUC has failed to act as UTex alleges, then under the FTA the FCC will arbitrate the agreement; UTex's remedy is to go to the FCC, not to Federal court."] (Emphasis added)

[11] Petition Exhibit 6, at 12 ["The 1996 Act not only makes clear that state commissions are not required to arbitrate ICAs, but also dictates what happens if a state commission does not honor a petition for arbitration: Section 252(e)(5) of the 1996 Act provides that if a state commission 'fails to act to carry out its responsibility under' Section 252, the FCC 'shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.' Section 252(e)(6), in turn, expressly provides that the FCC's assumption of responsibility (with federal court review of the FCC's decisions in the arbitration) 'shall be the exclusive remedies for a State commission's failure to act.' Because recourse to the FCC is the exclusive remedy for a state commission's alleged failure to act, a 'state commission's decision not to act is not subject to review' in court. *MCI Telecomm.unications Corp. v. Bell Atl.antic- Pennsylvania*, 271 F.3d 491, 511 (3d Cir. 2001) (emphasis added, footnote omitted). UTex, therefore, has not stated a claim on which relief can be granted."]

[12] *Browning Manufacturing v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197 (5th Cir. 1999). "The purpose of the [judicial estoppel] doctrine is to 'protect the integrity of the judicial process', by 'prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self interest,'" *citing Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988).

2004). The purpose of the doctrine is "to prevent parties from 'playing fast and loose' with (the courts) to suit the exigencies of self interest." *Id.* at 1305 (citing *Scarano v. Central Ry. Co. of New Jersey,* 203 F.2d 510, 513 (3d Cir.1953)). The doctrine applies to legal arguments as well as factual allegations. *See, e.g., Jett v. Zink,* 474 F.2d 149, 154-55, *reh'g denied,* 474 F.2d 1347, 1348 (5th Cir.), *cert. denied, sub nom. Sterling Oil of Oklahoma, Inc. v. Chamberlain,* 414 U.S. 854, 94 S.Ct. 153, 38 L.Ed.2d 104 (1973) (party who argued that action was *quasi in rem* was precluded from arguing at a later stage in the litigation that the action was *in personam*); *In re Double D Dredging Co.,* 467 F.2d 468, 469 (5th Cir.1972) (party who argued that a ship had been in navigable waters was later estopped from arguing that the ship had not been in navigable waters).

Here, the Texas PUC argued both in oral argument and in briefs that UTEX's sole remedy for the Texas PUC's failure to act was to see preemption at the FCC. The Texas PUC's Motion to Dismiss in the argued that "where a state commission chooses not to act, or allegedly otherwise fails to carry out its responsibility, FTA Section 252(e) (5) plainly states that an aggrieved party's remedy is to go to the FCC, not to the Federal district court ... a proceeding before the FCC ... is the *exclusive* remedy for a state commission's failure to act."[13] The District Court acceded to the Texas PUC's jurisdictional argument, dismissing the "failure to act" claims, finding that an "abatement" did not give rise to federal court remedy. Having convinced the federal court that UTEX's remedy was a the FCC, the Texas PUC cannot now be heard to argue otherwise. The absurd result of not being allowed to arbitrate a new agreement before the PUC and simultaneously not being permitted to seek redress through a preemption petition leaves

[13] Texas PUC's and Commissioners' Motion to Dismiss under Fed. R. Civ. P. 12 (b)(1) and (6) and Supporting Brief, Docket No. 37 in UTEX v. Texas PUC , et al. No. A-09-CA-567-LY

UTEX with no remedy and the Texas PUC should not be absolved of its duplicitous positions disguising its failure to act.

The Texas PUC also expressly admitted to the federal district court that it was declining to make a "determination" and so its arguments to the contrary before the Commission are, again, barred by judicial estoppel. In particular, the Texas PUC's Motion to Dismiss stated that "[t]he abatement allows the FCC to first make the nationally applicable policy determinations that are central to the arbitration of a new UTEX agreement. For this very reason, the [Texas PUC] declined to make such determinations ..."[14]

ILEC commentors also attempt to justify the failure to act based on the notion that the Texas PUC has discretion, or should at least be excused for its decision, to stop processing the case given the alleged current uncertainty over the regulatory classification of and appropriate intercarrier compensation results concerning VoIP. Again, they are wrong Regardless of whether one believes it is reasonable for a state commission to choose whether to process a case under a given set of circumstances, UTEX certainly acknowledges that the Texas PUC had this choice, and the decision whether to resolve a matter is within the state commission's discretion. What a state commission cannot do, however, is refuse to proceed to decision and then attempt to preclude the FCC from "stepping in their shoes" to perform the statutory function of making the required determinations in a timely fashion.

The Texas PUC, AT&T Texas, and the other ILEC commentors seem to have no problem putting UTEX in a black hole – unable to secure a replacement agreement and forced to continue operating under an agreement that is long-expired and is now over 10 years old, with no remedy for this clear denial of both procedural and substantive due process. They are more than

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[14] *Id. at* 16.

willing to let UTEX burn while the industry and regulators fiddle with intercarrier compensation "reform" and ultimately devise new, prospective rules. This cannot be the law, since it is neither fair nor reasonable. It is clear that the Texas PUC has "failed to act" and since the district court does not have jurisdiction then the FCC does have jurisdiction and must exercise that jurisdiction. There is no discretion, only a duty.

Some of the ILEC commentators, nonetheless, suggest that the Commission has discretion to deny preemption even if the state commission has failed to act, if the reason is that a major issue in contention is unsettled or the topic is under consideration in other ongoing general rulemaking proceedings. They are simply wrong. There is no such discretion. "Section 252(e)(5) *directs* the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which a state commission 'fails to act to carry out its responsibility under [section 252].'"[15] "We conclude that the circumstances presented by Northland *require* us to assume the jurisdiction of the New York Commission. Section 252(e)(5) *directs* the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which a state 'fails to act to carry out its responsibility under [section 252].'"[16] "Therefore, we conclude that the New York commission has 'failed to act to carry out its responsibility' under section 252. Accordingly, the Act *compels* us to assume the jurisdiction of the New York commission and resolve the outstanding interconnection dispute."[17] "If a state commission fails

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[15] Memorandum Opinion and Order, *In the Matter of Petition of KMC Telecom of Virginia, Inc., KMC Telecom V of Virginia, Inc., and KMC Data LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Sprint*, WC Docket No. 05-39; DA 05-1008, ¶ 5, 20 FCC Rcd 7542, 7543 (rel. Apr. 2005) (emphasis added).

[16] Memorandum Opinion and Order, *In the Matter of Petition of Northland Networks, Ltd. for Preemption of the Jurisdiction of the New York Public Service Commission Pursuant to Section 252(e)(5) of the Communications Act of 1934, as Amended*, WC Docket No. 03-242, DA 04-354, ¶ 2, 19 FCC Rcd 2396 (rel. Feb. 2004) (emphasis added).

[17] Memorandum Opinion and Order, *In the Matter of MCImetro Access Transmission Services LLC Petition for Preemption of the Jurisdiction of the New York Public Service Commission Pursuant to Section 252(e)(5) of the*

to act to carry out its responsibility under section 252 of the Act in any proceeding or other matter under section 252 of the Act, the Commission *shall* issue an order preempting the state commission's jurisdiction of that proceeding or matter ..."[18] These authorities all speak to the mandatory nature of the Commission's duty ("directs," "requires," "compels," and "shall"); there is no "may." If the state commission fails to act then the Commission must preempt.

It is true that intercarrier compensation in general and Internet/VoIP matters in particular have roiled the industry and perplexed regulators since 1996. From its inception in 2000, UTEX has been an active participant in virtually all of the FCC cases on the topic. It is also true that there are several ongoing rulemakings that would – if they were ever actually concluded – impose new regulations that would operate on a prospective, going forward basis. UTEX and the ILECs all agree that it is far past time for the Commission to finish that job. But, the fact those general rulemaking proceedings interminably and slowly continue is no reason or justification for denying preemption in this matter. Indeed, the fact that these proceedings have continued for so long, and the fact that it appears they will not conclude any time soon, strongly counsels in favor of preemption, not against it.

In its comments, USTA argues that "UTEX's Petition seeks less to clarify existing rules than to change them." USTA makes this argument despite simultaneously acknowledging that "arbitration decisions must rest on the rules in effect at the time." UTEX believes that the ILECs are the ones trying to change the rules on intercarrier compensation so as to impose access charges on VoIP and – their ultimate goal – all other ESP traffic. But they are incorrect about UTEX seeking to change the rules in this case. After preemption is granted, the arbitration

Communications Act of 1934, as Amended, CC Docket No. 02-283, DA 02-3289, ¶ 9, 17 FCC Rcd 23953, 23957 (rel. Nov. 2002) (emphasis added).

[18] 47 C.F.R. § 51.801(a) (emphasis added).

between UTEX and AT&T Texas will proceed before the Commission, through delegation to the appropriate Bureau. The matter between AT&T Texas and UTEX will be a form of "adjudication" not rulemaking. The Bureau will decide the open issues based on the Commission's rules as they exist at the time, whatever they are.[19] New rules will not flow from the arbitration decision; indeed the Bureau cannot make new rules. Put simply, if new intercarrier rules are promulgated in the interim, they will be applied to the open issues.

The ILECs' real goal is to avoid any possibility that the Commission might render a decision about what the current rules provide on the topic. They know the only possible result that will obtain will not be to their liking and they fear they may not be able to secure a change to the rules to overturn the result that so scares them.[20] Nonetheless, just so the record is clear: UTEX seeks preemption so that it can have its arbitration to resolve the open issues and secure a replacement agreement. UTEX is not asking the Commission to make rules in this case; it wants the current rules, whatever they may be, to be applied. . If the rules change during the pendency of the arbitration, then the new rules will apply. If the rules change after the arbitration is concluded, then presumably that will be a change of law and the agreement will be amended to conform to the change of law.

The Texas PUC states that there was some delay in this case that was "in large part" due to UTEX's conduct. Even assuming that is a true statement, which it is not, this does not justify the Texas PUC's determination not to decide this matter. Their failure to act is still an injustice.

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[19] 47 C.F.R. § 51.807(c)(1).

[20] The Commission has adopted the unremarkable proposition under the current rules that if IP is used only for transmission and there is no change in form or content or an offer of enhanced functions that are not adjunct to basic, and if a communication begins and ends on the PSTN then an interexchange offering is "telephone toll" – a telecommunications service – and access is due. But, it also has recognized that where there is a change in form or content and an offer of non-adjunct to basic enhanced functions then access is not due. The ILECs want to change the rule and impose access on everything, regardless of whether the underling service is or is not a telecommunications service or an enhanced/information service.

If the case remains abated, UTEX will not receive any hearing or opportunity to argue its position. This renders the Texas PUC's actions arbitrary and capricious and violates UTEX's due process rights.

UTEX's petition and the comments of some of the ILEC commentors[21] discussed a separate post-ICA complaint case before the Texas PUC concerning intercarrier compensation for VoIP under the current, expired agreement. An update is in order. On August 13, 2009, the Texas PUC considered the Award on reconsideration and by a 2-1 vote the majority orally decided to reverse the Award's findings on access charges. A written order is being drafted, but has not yet been issued. The Texas PUC has, however, indicated that it will "receive" further submissions on the VoIP topic on Tuesday, August 18. The matter will be taken up again on August 26 on other disputed issues (there were 100 discrete decision point issues in the entire case) and there may or may not be further developments on the topic of VoIP. UTEX will advise the Commission when that case is completed at the Texas PUC level.

CONCLUSION

UTEX commenced this arbitration on July 31, 2002. The Texas PUC abated Docket 26381 on June 7, 2006. To this date, the Texas PUC has not given any indication that it intends to again take up Docket 26381. Abatement is a clear violation of the Act, and a complete violation of UTEX's due process rights. It is a "failure to act." Accordingly, the Commission should issue an order preempting the Texas PUC's jurisdiction over this matter and should initiate an arbitration proceeding to resolve the open issues between UTEX and AT&T.

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[21] Petition, p. 3; AT&T Comments, p. 4, note 5; NECA Comments, p. 4.

Dated: August 18, 2009

Respectfully submitted,

MUNSCH HARDT KOPF & HARR, P.C.

By: _____

Patricia B. Tomasco
State Bar No. 01797600
Richard C. King Jr.
State Bar No. 24007491
600 Congress Avenue, Suite 2900
Austin, Texas 78701
(512) 391-6100 (telephone)
(512) 391-6149 (facsimile)

Attorneys for UTEX Communications Corp.

W. Scott McCollough
General Counsel
UTEX Communications Corporation
1250 S Capital of Texas Hwy, Bldg 2-235
West Lake Hills, Texas 78746

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to all counsel of record herein by email on this the 18th day of August, 2009, to wit:

Theodore A. Livingston
Dennis G. Friedman
Michael T. Sullivan
Nissa J. Imbrock
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606
Telephone: (312) 782.0600
Facsimile: (312) 701.7711

Mary A. Keeney
GRAVES, DOUGHERTY, HEARON & MOODY
A Professional Corporation
401 Congress Avenue, Suite 2200
Austin, Texas 78701
Telephone: (512) 480.5682

Facsimile: (512) 480.5882

Attorneys for Southwestern Bell Telephone, L.P.
d/b/a AT&T Texas

Texas Public Utility Commission *(via Certified Mail)*
1701 N. Congress Avenue
PO Box 13326
Austin, TX 78711-3326
Telephone: (512) 936-7000

Attorney for UTEX Communications Corporation